

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUNIOR FRED BLACKSTON,

Defendant-Appellant.

UNPUBLISHED

May 24, 2007

No. 245099

Van Buren Circuit Court

LC No. 00-011976-FC

ON REMAND

Before: White, P.J., and Markey and Owens, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court, which vacated our original opinion and remanded to this Court

for reconsideration of the issue whether the trial court's error, if any, in excluding the statements in question was harmless beyond a reasonable doubt. The court should fully evaluate the harmless error question by considering the volume of untainted evidence in support of the jury verdict, not just whether the declarants were effectively impeached with other inconsistent statements at the first trial. If the court concludes that the error was harmless, it should consider defendant's remaining allegations of error. [*People v Blackston*, 474 Mich 915 (2005).]

We conclude that the error was not harmless beyond a reasonable doubt.

For ease of understanding, we reprint portions of our original opinion, *People v Blackston*, unpublished opinion per curiam of the Court of Appeals, issued January 18, 2005 (Docket No. 245099):

Defendant was convicted of first-degree murder, MCL 750.316, and was sentenced to life imprisonment. He appeals as of right, and we reverse and remand for new trial.

This case stems from a homicide that occurred more than fifteen years ago. On the evening of September 12, 1988, Charles Miller disappeared after visiting defendant's Bangor home. On July 10, 2000, Charles Dean Lamp, a co-defendant, led police to a site one-half mile from his home, where the buried remains of a body matching Miller's description were found. Defendant was subsequently arrested and charged in connection with Miller's death.

A jury trial was held in April 2001, and defendant was found guilty of first-degree murder. However, the trial court granted defendant's motion for new trial based on the trial court's misinforming the jury regarding the prosecution's grant of immunity to prosecution witness Guy Carl Simpson in exchange for his testimony. A second jury trial took place in October 2002.

At this second trial, Simpson appeared in court, but resisted giving testimony. He was found to be unavailable, and the court admitted his testimony from the first trial together with an instruction clarifying the prosecutor's grant of immunity. A written statement Simpson had given after the first trial, in which he recanted his testimony, explained why he had testified as he had, and stated that only he and Lamp were with Miller when he was killed, was not admitted.

According to Simpson's testimony at the first trial, which was read to the jury at the second trial, on the evening of September 12, 1988 Simpson was dropped off at the home of defendant and defendant's then girlfriend, Darlene (Rhodes) Zantello, for an unannounced visit sometime between 10:00 and 10:30 p.m. When Simpson arrived, defendant and his one-year-old daughter were at home, and Zantello may have been there at that time as well. Miller also was at defendant's house when Simpson arrived. Between one-half hour and one hour after Simpson arrived, Lamp, who was also a friend of defendant's, and whom Simpson did not like, arrived at defendant's home. Lamp announced that he wanted to steal some marijuana from a field he knew about. Miller was known to have a knack for finding marijuana plants, and Simpson assumed that it had been planned in advance that Miller would go with Lamp and defendant to get the marijuana. Defendant originally stated that he could not go because he had to stay with his daughter, since Zantello had left by then, and suggested that Simpson accompany Lamp and Miller in his stead. Eventually, however, all four men, together with defendant's daughter, left the home to go steal the marijuana.

Lamp drove into the woods, driving around for approximately forty-five minutes before turning off onto an unpaved "two-track" road and stopping. All four men got out, while the child was left sleeping in the car, and Lamp took a rifle out of the trunk of his car and handed it to defendant. Lamp walked off some distance ahead of the others, allegedly to look for the field, while defendant, Miller, and Simpson followed behind. Shortly thereafter, Lamp called out that he had found the field, and at that point defendant turned and shot Miller one time, and Miller fell to the ground, apparently dead. Lamp then rejoined Simpson and defendant, and Simpson and Lamp moved Miller's body to a nearby, pre-dug grave and placed Miller in the grave. Defendant then jumped down into the grave and returned a moment later with something in his hand, which Simpson believed

to be one of Miller's ears. Lamp then filled in and disguised the grave, and the three men returned in Lamp's car, along with defendant's daughter, to defendant's home. Approximately one half-hour later Lamp left to go home, while Simpson remained at defendant's home for the remainder of the night.

Simpson testified that several days after the murder Lamp told him that they had killed Miller because Miller had "gotten in over his head with the wrong people." Simpson testified that defendant told him that he needed to show Miller's ear to Benny Williams. Several days after the murder, Simpson was with defendant when he took a bag, which Simpson believed contained Miller's ear, and threw it in a nearby river.

Simpson admitted that in the past he had told several different versions of the events surrounding Miller's disappearance, including that only he (Simpson) and Lamp, and not defendant, were involved in Miller's death; that an entirely different person, Charles Pippin, committed the crime; and that Miller was not really dead, but rather was simply working in another state. Simpson admitted that he had made his statements with an eye to his own personal gain, and further admitted that if he testified to a different set of events at defendant's trial, he would probably lose his grant of immunity and would risk perjury charges. Simpson also confirmed that Lamp had, in the past, threatened to kill him if he gave any information regarding Miller's murder to the police or if he endangered Lamp's own plea-agreement in any way.

Simpson's testimony as to the events surrounding Miller's death was largely corroborated by Lamp. Lamp, who was testifying pursuant to a plea-bargain under which he was permitted to plead guilty of manslaughter and receive a ten to fifteen year sentence in exchange for his testimony, testified that defendant was angry with Miller because he believed Miller was planning to rob Benny Williams, a local drug dealer who supplied defendant with cocaine. As a result, Lamp and defendant had discussed killing Miller three or four times, and ultimately they decided to take Miller out to a pre-selected, isolated area on the pretext of stealing marijuana, and to shoot him and bury his body in a pre-dug grave. The two men located an appropriate area not far from where Lamp then lived, off an unpaved two-track road, and several nights before Miller's murder they prepared a grave at this location, with both Lamp and defendant taking turns digging.

Lamp testified that on the night of Miller's murder, he drove to defendant's house, and when he arrived he found that not only was defendant there, but Simpson was present as well. Lamp was not happy that Simpson was there, because they did not like each other, but defendant took him aside and informed him that Simpson was going to assist in the murder. Approximately a half-hour after Lamp arrived, Miller was dropped off at defendant's house, and then the four men, together with defendant's daughter, got into Lamp's car and drove to the pre-selected site. As previously planned by Lamp and defendant, when they arrived at the site, Lamp handed defendant a rifle, which he took from the trunk of the car, and then Lamp walked alone ahead of the others to find the

pre-dug grave. When he found the grave, he shouted back to the others and then he heard a single gunshot. He then went back to the others, where he found Miller lying on the ground with blood seeping from the back of his head and defendant holding the rifle in his hands. Lamp, Simpson, and defendant carried Miller's body to the awaiting grave, defendant jumped in and cut off Miller's ear, and then the three men filled in the grave and disguised it so that it would not be discovered. Lamp stated that he subsequently sold the rifle.

Lamp confirmed that he had once threatened to kill Simpson when he found out Simpson was wearing a hidden wire in an attempt to incriminate Lamp and defendant, but insisted it was merely an idle threat and that he had no intention of ever following through on it.

Rebecca (Krause) Mock, Miller's girlfriend at the time of his death, and her sister Roxanne (Krause) Barr, who lived with Miller and Mock at the time Miller was killed, both testified that defendant admitted being present at Miller's murder, although their testimony differed with regard to whether defendant admitted shooting Miller.

Darlene Zantello, formerly Darlene Rhodes, who was defendant's girlfriend at the time of Miller's death, was called to the stand by the prosecution, but denied having any memory of the events of the night Miller died, her prior statements to police, her prior testimony, or an affidavit she signed after the first trial. The court established through questioning that Zantello had been an alcoholic for many years, and had suffered head injuries. The court found Zantello to be unavailable as a witness, pursuant to MRE 804, and permitted the prosecution to read Zantello's testimony from defendant's first trial into the record.

At the first trial, Zantello testified that she lived with defendant in September 1988, that she was pregnant at that time, that on the night of Miller's death she had experienced severe stomach pains and had gone to the hospital. Zantello testified that she spent three or four hours at the hospital before returning home to find the house empty. After unsuccessfully trying to locate her daughter at a friend's, she laid down and fell asleep. She was awakened some time later when defendant and Simpson returned to the house. Zantello testified that she heard Simpson say something to defendant like "that was like a movie with all that blood," and that she very vaguely recalled someone saying something regarding someone's ear being cut off. She also had a vague recollection of Simpson saying something about almost blowing someone's whole head off and about a pre-dug hole. Zantello testified that when Miller's girlfriend, Mock, came to the house looking for him, defendant denied any knowledge of his whereabouts. A year or two later, however, after Zantello and defendant had broken up, defendant came over to Zantello's house where Mock was then living. He became weepy and said he was sorry that "they did what they did," but he did not say that he himself had done anything.

Following the reading of her testimony into the record, Zantello was recalled to the stand. On cross-examination she denied any recollection of telling police in 1988 and 1990 that defendant was at home when she returned from the hospital. When defense counsel began to question her regarding the affidavit executed after the first trial in which she stated that her first statement to the police was true and her testimony at trial was not, the trial court stopped the questioning on the basis that the affidavit was executed after the first trial, and therefore was not a *prior* inconsistent statement.

Three of defendant's sisters, Shirley Gargus, Sheila Blackston, and Linda Johnson, each testified as to defendant's whereabouts on the night of Miller's murder and confirmed Zantello's assertion that she went to the hospital that night. Gargus testified that on September 12, 1988 around 11:00 p.m. Sheila Blackston stopped by to leave her children for Gargus to baby-sit. Blackston had Zantello with her, and told Gargus that she was taking Zantello to the hospital for stomach pain. Around midnight, Blackston called her from the hospital and asked her to go check on defendant, since he had been left alone with his and Zantello's one-year-old baby. When she arrived at defendant's house a few minutes later defendant and the baby were at home.

Blackston confirmed Gargus' testimony, stating that on September 12, 1988 she took Zantello to the hospital around 11:00 p.m. for stomach pain, and dropped her own children off with Gargus on the way to the hospital. When she returned Zantello to Zantello's and defendant's home after leaving the hospital, defendant was at home.

Johnson testified that on September 12, 1988 she got into a fight with her husband and went over to defendant's house around 11:30 p.m. to calm down. She stated that when she arrived, defendant and the baby were at the house alone, asserted that the only visitor during the time she was at defendant's house was defendant's friend Lonnie Johnson, who visited for approximately twenty minutes around midnight, and told the court that when she left defendant's home at around 12:45 a.m. defendant was still at home.

Defendant also called Benny Williams. Williams asserted that he had not known Miller, that he had never asked anyone to kill Miller, that he did not know anything about Miller's death, and that no one had ever brought him a human ear. Williams did admit, however, that in 1988 he was a cocaine dealer in Bangor. A police officer had earlier testified that the police concluded that Williams was not involved in the murder.

The prosecution's experts expressed the opinion that Miller died from a gunshot wound to the neck. Defendant's experts expressed the opinion that Miller's injuries were caused by blunt force trauma.

II

Defendant first argues that the trial court abused its discretion when it denied his motion for a new trial, which was based on the claim that the court had erred in barring defendant from impeaching the prior recorded testimony of two witnesses with inconsistent statements made after the two had testified in defendant's first trial but before defendant's second trial. The court agreed that the statements were, in fact, admissible under MRE 806, but determined that they were nonetheless properly excluded because the statements were more prejudicial than probative and, thus, were inadmissible under 403. We agree with defendant that the court erred in denying him the right to impeach the witnesses with these statements.

* * *

First, as the trial court recognized, and the prosecution does not contest, MRE 806, rather than MRE 613, governs the use of Simpson's and Zantello's statements for impeachment purposes. MRE 806 provides:

ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C),(D) or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Defendant should have been permitted to impeach the witnesses with their statements under MRE 806, which permits the credibility of a declarant of an admitted hearsay statement to be attacked with any inconsistent statement made at any time, and without regard to whether the witness is afforded an opportunity to deny or explain.

* * *

Federal courts have held that Rule 403¹ is an extraordinary remedy, the major function of which is to exclude matters "of scant or cumulative probative

¹ Where a Michigan Rule of Evidence is modeled after its Federal Evidentiary Rule counterpart,
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force, dragged in by the heels for the sake of their prejudicial effect,” and have stated that FRE 403 carries a strong presumption in favor of admissibility. *United States v Grant*, 256 F3d 1146, 1155 (CA 11, 2001), quoting *United States v Utter*, 97 F3d 509, 514-515 (CA 11, 1996), *United States v Cross*, 928 F2d 1030, 1048 (CA 11, 1991), and *United States v Church*, 955 F2d 688, 703 (CA 11, 1992). At the same time, however, federal courts have also noted that a reviewing court must remember that the trial court, and not the appellate court, is in the best position to assess the extent of the prejudice caused to a party by a piece of evidence, and have further stated that when a trial court has given careful attention to a balancing of prejudice and probative value, appellate courts should be particularly mindful of their duty not to reverse absent a clear abuse of discretion. *Vaughn v Willis*, 853 F2d 1372, 1380 (CA 7, 1988), quoting *United States v Long*, 574 F2d 761, 767 (CA 3 1978), and *United States v Garner*, 837 F2d 1404, 1416 (CA 7, 1987).

The general principle that witness credibility is for the jury to determine is not disturbed by FRE 403. Therefore, evidence should not be excluded under FRE 403 because the trial court considers a witness unworthy of belief. Instead, “balancing probative worth against unfair prejudice involves the trial court giving full credit to the [evidence] and then considering probative worth against unfair prejudice.” 1 Mueller & Kirkpatrick, *Federal Evidence* (2d ed), § 94. See *United States v Thompson*, 615 F2d 329, 332 (CA 5, 1980) (reversing trial court because FRE 403 does not authorize judge to “protect” jury from contradictory testimony, nor exclude evidence because judge “does not find it credible”); *Bowden v McKenna*, 600 F2d 282, 284 (CA 1, 1979) (weighing probative value against unfair prejudice under FRE 403 means probative value “if the evidence is believed, not the degree the court finds it believable”).

* * *

In the instant case, recognizing the appropriate standard of review, we nevertheless are persuaded that the trial court abused its discretion in denying the motion for new trial on the basis that barring the use of the statements to impeach the witnesses was supported by MRE 403. The court concluded that use of the statements would have been unfairly prejudicial because the statements went beyond mere statements and were arguments for acquittal, and the court believed that the witnesses had deliberately made themselves unavailable and given the statements “to have [their] cake and it too.” However, the statements were not offered to prove the truth of what was in them, but to attack the witnesses’ credibility. As in *Grant*, the very reason the court excluded the statements, because it questioned the veracity and credibility of the witnesses, made the statements all the more probative on the credibility issue. Defendant should have been free to show the jury that the witnesses were unworthy of belief. Credibility

(...continued)

this Court can look to federal precedent for guidance. *People v Barrera*, 451 Mich 261, 267; 547 NW2d 280 (1996).

is always a question for the jury, and the court erred in concluding that it would have been proper to insulate the jury from the witnesses' contradictory statements. Further, the court was free to redact any portions of the statements that did not amount to a statement inconsistent with the witness' hearsay statement.

In a supplemental brief filed in propria persona, defendant raises a similar argument with respect to other witnesses who would have testified to prior inconsistent statements of Simpson in which he stated that only he and Lamp were involved in Miller's murder. Anticipating defendant's calling such witnesses, as was done in the first trial, the prosecutor asked the court to exclude the testimony of any witness who would testify to a prior statement that was not brought to the witness' attention under MRE 613(b). Defense counsel agreed that she intended to call a number of such witnesses, and had affidavits from such witnesses, including some who were not known at the time of the first trial. The court ruled the testimony inadmissible. For the reasons discussed above, this testimony was admissible under MRE 806, and the court erred in excluding it.

We reject the argument that the court's error was harmless because Simpson and Zantello had already been effectively impeached with inconsistent statements at the first trial. The jury heard evidence that Zantello's first statements to police were that defendant was home when she returned from the hospital, and that she knew nothing about Miller's disappearance except that defendant was not involved. However, these statements were given shortly after Miller's disappearance, and when Zantello was living with defendant. The jury could have easily decided that the earlier inconsistent statements did not undermine the trial testimony, reasoning that Zantello had given a statement in March, 1990 that incriminated defendant, and that at the time of trial, Zantello was no longer involved with defendant, and was therefore no longer willing to lie in his behalf. The fact that Zantello reaffirmed her earlier position shortly before the second trial would have undermined her trial testimony in a way that the earlier statements could not.

Regarding Simpson, although he was impeached with having given prior inconsistent versions of what happened to Miller, as set forth above, and he admitted at the first trial that he had told Jody Harrington shortly after the shooting that only he and Lamp were involved, he also admitted telling police that he never made such a statement to Harrington. Further, Detective Sergeant Averill testified that Simpson had remained consistent in the version of events he claimed to have witnessed, and stated that Simpson's testimony at defendant's first trial had been consistent with this version of events. Had Simpson's inconsistent written statement and the testimony of other witnesses regarding other inconsistent statements been admitted under MRE 806, the jury would have had a very different view of Simpson's credibility. We conclude that defendant has shown the requisite prejudice - - that upon a review of the entire record, it is more probable than not that the error in denying the admission of substantial impeachment evidence was outcome determinative. [*Blackston, supra*, slip op at 1-6, 8-9.]

We again conclude that the trial court's exclusion of the evidence was, in fact, error.

We now reconsider whether the error was harmless beyond a reasonable doubt "by considering the volume of untainted evidence in support of the jury verdict. . . ." The prosecution makes much of the interlocking nature of the testimony. However, Lamp's testimony would be subject to the utmost scrutiny, given his undisputed involvement in the murder, his plea agreement, and defendant's theory, supported by many of the impeaching statements that were not admitted, that Lamp had done the shooting himself. Further, much of the interlocking testimony concerned the allegation that defendant killed Miller and cut off his ear at the direction of drug dealer Benny Williams. However, police testified that they had no evidence connecting Williams to the murder, Williams testified that he did not know Miller and had not received one of his ears, and police also testified that there was no physical evidence indicating that Miller's ear had been cut off. Regarding Mock and her sister, there was testimony that they and defendant were always drinking when they were together. Further Mock, her sister, and Zentello, who was supposedly present during some of the discussions, gave differing accounts of what defendant said. Lastly, we conclude that the evidence overwhelmingly supported that defendant knew something about the murder, but his role, and the extent of his knowledge and participation or assistance, largely depended on Simpson's testimony. We cannot say with confidence that defendant would have been convicted of first-degree murder if the court had let in the impeaching evidence, as it was obliged to do.

We again remand for a new trial. If Simpson is again declared to be unavailable, his refusal to testify should be clearly developed on the record. Additionally, to avoid any further claims of ineffective assistance of counsel, all the witnesses defendant has identified as supporting his case should be identified for defense counsel on remand, together with the testimony defendant believes to be relevant. The trial court should ensure that a satisfactory explanation is provided somewhere in the record for absence of, or the decision not to call, any witness whose testimony is not presented.

We reverse and remand for a new trial. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Jane E. Markey
/s/ Donald S. Owens